

**A YKL Engineering Sdn Bhd v Sungai Kahang Palm Oil Sdn Bhd
& Anor**

B HIGH COURT (MUAR) — CIVIL SUIT NO 22NCVC-61–12 OF 2011
ZAINAL AZMAN J
28 FEBRUARY 2017

C *Copyright — Infringement — Whether there was infringement — Plaintiff sued defendants for infringement of plaintiff's patent known as fruit bunch splitter — Whether there was infringement of copyright subsisting in various design drawn for plaintiff's fruit bunch splitter*

D *Patents — Infringement — Action for — Plaintiff sued defendants for infringement of plaintiff's patent known as fruit bunch splitter — Whether invention embodied in plaintiff's patent was inventive and not obvious to persons skilled in the art at material time — Whether there was infringement of plaintiff's patent*

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F The plaintiff, an inventor of machines for the palm oil industry, had carried out demonstration at the first defendant's factory for a machine known as fruit bunch splitter ('the plaintiff's machine'). Nevertheless, instead of buying the plaintiff's machine, the first defendant purchased machine known as SK Machines from the second defendant. According to the plaintiff, the SK Machines were substantial reproduction of the copyrighted work ('the plaintiff's patent') of the plaintiff's machine, hence, the plaintiff sued both the defendants for infringement of copyright. The plaintiff's evidence was made through SP1, SP2, SP3, SP4 and SP5. SP4 and SP5 were expert witnesses who had extensive practical experience in the palm oil milling industry and they had relevant technical knowledge to qualified them as the relevant person skill in the art. In defence and counterclaim, the defendants submitted that the plaintiff's patent was invalid for lack of novelty and increativeness by virtue of seven pleaded prior art namely: the YCS article, the US Patent Coconut dehustking machine, the four articles (IPC article, National Seminar article, MPOB article and JOPR article) and the Kim Loong drawing. Further, the defendants submitted that: (a) they have never had access to the copyrighted works; (b) the plaintiff's demonstration unit was not installed at the said premises and was immediately transported back after the demonstration; (c) the SK Machines were adapted from the Kim Loong machine which was completed in or around 2003; and (d) the SK Machines were not copied, replicated, made or fabricated from any design drawing of the plaintiff's machine. The defendant's case was supported by the evidence by SD1, SD2,

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SD3, SD4, SD5 and SD6. SD4 and SD5 were the defendants' expert witnesses whereas SD6 was the patent attorney.

Held, allowing the plaintiff's claim and dismissing the defendants' counterclaim with costs:

- (1) Based on the evidence and submissions of parties, the court concluded that the invention embodied in the plaintiff's patent was inventive and not obvious to persons skilled in the art at the material time (see para 37).
- (2) SP4 was a person who was skilled in the relevant arts by virtue and nature of his job functions and experience that he had the technical background and practical interest in the subject matters. SP4 had assisted the court in interpreting the patent and understanding the relevant common general knowledge about the prior art at the priority date. In contrast, the report prepared by both SD4 and SD5 bore uncanny similarities in term of phraseology and even wording found in their report and opinion were highly questionable as if it was prepared by someone else. In addition, SD6 being a patent agent with no practical experience or interest in palm oil machinery could not be regarded as a person skilled in the art (see paras 39 & 42–43).
- (3) The defendants' defence was at best bare denials which were unsustainable in light of the evidence adduced by the plaintiff or an actual causal connection between the SK Machines with the plaintiff's design drawings and the plaintiff's machine. Based on the plaintiff's evidence, the court found that the defendants had infringed the plaintiff's copyright because: (a) there was copyright subsisting in the copyrighted works and three-dimensional embodiment of the machine belonging to the plaintiff; (b) there was sufficient objective similarity between the defendants' SK Machines and the copyrighted works; (c) there was causal connection between the plaintiff's machine and the SK Machines through the inference of copying; and (d) the similarities between the plaintiff's machine as shown through the copyrighted works and the SK Machine constituted a substantial part of the original work (see paras 48–49).

[Bahasa Malaysia summary]

Plaintif, pencipta mesin-mesin bagi industri minyak sawit telah menjalankan demonstrasi di kilang defendan pertama bagi mesin yang dikenali sebagai *fruit bunch splitter* ('mesin plaintiff'). Walau bagaimanapun, defendan pertama tidak membeli mesin plaintiff sebaliknya membeli mesin yang dikenali sebagai SK Machines daripada defendan kedua. Menurut plaintiff, SK Machines tersebut merupakan peniruan keseluruhan kerja berhak cipta bagi mesin plaintiff, oleh itu, plaintiff telah menyaman kedua-dua defendan bagi kesalahan pelanggaran hak cipta. Keterangan-keterangan pihak plaintiff telah diberikan oleh SP1, SP2,

- A SP3, SP4 dan SP5. SP4 dan SP5 merupakan saksi-saksi pakar yang mempunyai pengalaman praktikal yang luas dalam industri pengilangan minyak sawit dan mereka mempunyai pengetahuan teknikal yang relevan yang melayakkan mereka sebagai seorang yang relevan yang mempunyai kepakaran dalam bidang tersebut. Dalam pembelaan dan tuntutan balas, defendan-defendan
- B berhujah bahawa paten plaintif tidak sah kerana kekurangan sesuatu yang baru dan tidak kreatif berdasarkan tujuh seni yang terdahulu yang diplidkan iaitu: 'YCS article', 'US Patent Coconut dehustking machine', empat artikel ('IPC article', 'National Seminar article', 'MPOB article' dan 'JOPR article') dan 'Kim Loong drawing'. Selanjutnya, defendan-defendan berhujah bahawa:
- C (a) mereka tidak pernah mempunyai akses kepada kerja-kerja berhak cipta plaintif tersebut; (b) mesin yang digunakan oleh plaintif bagi demonstrasi tersebut tidak dipasang di premis defendan dan telah diangkut kembali dengan segera selepas demonstrasi tersebut; (c) SK Machines tersebut telah diadaptasi daripada mesin Kim Loong yang telah disiapkan dalam atau sekitar tahun
- D 2003; dan (d) SK Machines tersebut tidak disalin, direplikasi, dibuat atau direka bentuk daripada apa-apa reka bentuk mesin plaintif. Kes defendan-defendan disokong oleh keterangan daripada SD1, SD2, SD3, SD4, SD5 dan SD6. SD4 dan SD5 merupakan saksi pakar defendan-defendan manakala SD6 merupakan peguam paten.
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Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan-defendan dengan kos:

- (1) Berdasarkan keterangan dan hujahan pihak-pihak, mahkamah memutuskan bahawa ciptaan yang terkandung di dalam paten plaintif adalah inventif dan tidak jelas kepada orang yang mahir dalam seni tersebut pada masa yang material (lihat perenggan 37).
- (2) SP4 merupakan orang yang mahir dalam seni yang berkaitan berdasarkan fungsi tugasnya dan pengalamannya bahawa dia mempunyai latarbelakang teknikal dan kepentingan praktikal terhadap pekara tersebut. SP4 telah membantu mahkamah dalam mentafsir paten dan memahami pengetahuan umum yang relevan berkaitan dengan seni terdahulu pada tarikh yang utama. Sebaliknya, laporan yang disediakan oleh SD4 dan SD5 mengandungi persamaan yang tidak masuk akal dari segi frasa, malahan ayat yang terkandung di dalam laporan dan pendapat mereka adalah sangat dipersoalkan seperti ianya disediakan oleh orang lain. Tambahan lagi, SD6 sebagai seorang peguam paten yang tidak mempunyai pengalaman praktikal atau kepentingan dalam industri minyak sawit tidak boleh dianggap sebagai orang yang mahir dalam seni tersebut (lihat perenggan 39 & 42–43).
- (3) Pembelaan defendan-defendan hanyalah penafian semata-mata yang tidak mapan berdasarkan keterangan yang dikemukakan oleh plaintif atau hubungan kausal sebenar diantara SK Machines dengan lakaran

reka bentuk plaintif dan mesin plaintif. Berdasarkan keterangan plaintif, mahkamah mendapati bahawa defendan-defendan telah melanggar hak cipta plaintif kerana: (a) terdapat hak cipta yang terkandung di dalam kerja berhak cipta tersebut dan penjelmaan tiga dimensi mesin yang dimiliki oleh plaintif; (b) terdapat persamaan objektif yang mencukupi di antara SK Machines milik defendan-defendan dan kerja berhak cipta tersebut; (c) terdapat hubungan kausal di antara mesin plaintif dan SK Machines melalui inferens menyalin; dan (d) persamaan di antara mesin plaintif dan SK Machines seperti yang ditunjukkan melalui kerja berhak cipta tersebut merangkumi sebahagian besar daripada hasil kerja yang asal (lihat perenggan 48–49).]

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Notes

For cases on whether there was infringement, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7639–7641.

For cases on action for infringement, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1285–1287.

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Cases referred to

Bishwanath Prasad Radhey Shyam v Hindustan Metal Industries [1979] 2 SC 511, SC (refd)

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Catnic Components Ltd and Another v Hill and Smith Ltd [1982] RPC 183, HC (refd)

General Tire and Rubber Company v Firestone Tyre and Rubber Company Ltd [1972] RPC 457, SC (refd)

Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise) [2009] 3 MLJ 525, HC (refd)

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Seng Kong Shutter Industries Sdn Bhd & Anor v SKB Shutters Manufacturing Sdn Bhd [2014] 5 MLJ 98; [2014] 4 CLJ 1037, CA (refd)

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The Asia File Products Sdn Bhd v Brilliant Achievent Sdn Bhd & 2 Ors (No 05 (IP)-22–47 of 2010) (unreported), HC (refd)

Legislation referred to

Patents Act 1983

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Teo Bong Kwang (Ng Yueng May with him) (Wong Jin Nee & Teo) for the plaintiff. Ken St James (DJ Louis with him) (DJ Louis & Co) for the defendants.

Zainal Azman J:

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INTRODUCTION

[1] In this action the plaintiff is suing both the defendants for infringement of Malaysian Patent No MY 139512-A. Specifically the patent relates to split

- A palm oil fresh fruit bunches ('ffb') to improve steam penetration during the sterilisation process and at the same time causing minimal damage to the fruitlets, thereby improve oil quality and increase yield.
- B [2] This according to the plaintiff is in contrast to the existing machine used in the palm oil industries namely the crusher, muncher, mono muncher and schered the fruit bunches and fruitlets, thereby causing substantial increase in free fatty acid ('ffa'). The higher the free fatty acid the lesser the quality of the oil.
- C [3] The defendants deny the plaintiff's claim. Even if the plaintiff's patent is valid, there is no infringement of the patent by the defendant in the making of the second defendant alleged infringement machine for the first defendant.
- D [4] The defendants alleged that the plaintiff drawing and those three dimensional machines have infringed the copyright of the earlier prior art drawing and earlier three dimensional machines which were created and therefore there is no infringement of copyright.
- E THE PARTIES
- [5] The plaintiff are at all material time the inventor and manufacture of machines and specific equipment for the Palm Oil Industry and having their business at Lot 663, Batu 10 Kampung Paya Panjang, Bukit Pasir, Muar, Johor.
- F [6] The first defendant is a Malaysian incorporated company with the registered office at No 171-A, Jalan Seri Pelangi, Taman Pelangi, Johor Bahru and the business address is at Tingkat 9, Wisma Bunga, No 11, Jalan Landak, Kluang and the factory at Batu 22 Jalan Mersing, Lot 402, Mukim Kahang, Kluang, Johor.
- G [7] The second defendant is Malaysian company with the registered address at No 4, Tingkat 2, Jalan Dato' Haji Hassan, Kluang, Johor and its principle business was the maintenance of equipment and machine.
- H THE PLAINTIFF'S CASE
- I [8] On or about 24 April 2009 and 25 April 2009 the plaintiff had carried out a demonstration at the first defendant factory for the fruit bunch splitter. However, instead of buying that machine from the plaintiff, the first defendant purchased the two SK Machines sometime in September 2009 and January 2010. According to the plaintiff the SK Machines are substantial reproduction of the copyrighted work for the plaintiff's fruit bunch splitter where the most striking features were the two rollers with conical spike. These alone constitutes

substantial reproduction of the plaintiff machine.

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[9] The defendant claims that the said patent is invalid for lack of novelty and inretriveness by virtue of seven pleaded prior art namely:

(i) the YCS article (November 1963);

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(ii) the US Patent Coconut dehustking machine (24111/1987);

(iii) four articles:

(a) International Planters Conference (IPC) May 2000, July 2000, May 2002 and November 2005; and

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(iv) the Kim Loong drawing (crusher) — 1 August 2003.

[10] The defendant had sought leave to amend the defend and counter claim to include the data Kim Loong Machine as a prior art but their application was dismissed by this court and the Court of Appeal.

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THE TRIALS

[11] The plaintiff's evidence was made through five witnesses namely:

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(a) Yeo Koon Lean ('SP1');

(b) Michael Mc Laughlin ('SP2');

(c) Mooi Seng Heng ('SP3');

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(d) Khoo Kok Wah ('SP4'); and

(e) Ong See Boon ('SP5').

Both SP4 and SP5 are two expert witnesses who had extensive practical experience in the palm oil milling industry and possess the relevant technical knowledge to qualified them as the relevant person skill in the art.

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The defendant called six witnesses namely:

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(a) Khoo Chee Hong ('SD1');

(b) Tan Tian Foh ('SD2');

(c) Yeo Chai Seng ('SD3');

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(d) Lee Kim Tiak ('SD4');

(e) Chang Chow Swan ('SD5'); and

(f) David Alan Wyat (patent attorney) ('SD6').

- A [12] The plaintiff's expert witnesses are Khoo Kok Wah and Ong See Boon and the expert for the defendant are Lee Kim Tiah ('SD4') and Chang Chow Suan ('SD5').

THE PATENT

- B [13] Before dealing with specific issues which arise for determination, it is important at his point to understand the scope of the plaintiff's patent which was filed on 12 January 2006 (priority date). The grant of patent recognises and rewards the creativity of the inventor. Patent is a monopoly right conferred by
C the Intellectual Property Corporation of Malaysia ('MYIPO') on an invention. The Patents Act 1983 provides a protection for a period of 20 years to the plaintiff as patentee from the date of filing.

- D [14] In *Bishwanath Prasad Radhey Shyam v Hindustan Metal Industries* [1979] 2 SC 511 it was observed:

- E The object of patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain.

- F [15] SP4 identified 12 essential integers of claim 1 of the said patent while SP5 identified 11 main integers of claim 1 of the said patent. The 12 essential integers identified by SP4 are as follows:

Claim 1:

- G (a) a fruit bunch splitter;
(b) a body frame (13);
(c) a 'drum assembly' which is mounted onto the 'body frame' (13);
H (d) the 'drum assembly' has at least two roller drums (20, 25) which are rotatably fixed at both ends to the 'body frame' for rotation about a horizontal axis;
(e) the two 'roller drums' must have plurality of spikes (30) which are attached circumferentially to the drums;
I (f) the 'two roller drums' must be able to rotate in an inward, opposable manner with respect to each other so to receive fruit bunches along the

top of the gap between the 'roller drums';

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- (g) the 'roller drums' are parallel to each other and located at a distance from each other, when installed with the spikes and rotated at an inward and opposable manner at differential speed with respect to each other, provide for the splitting of the fruit bunches;

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- (h) the plurality of spikes would split fruit bunches in this fashion;

- (i) a power source;

- (j) the 'power source' must be mounted onto the 'body frame' (13);

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- (k) the 'power source' able to drive the rotation of the roller drums so as to cause splitting of fruit bunches; and

- (l) as a whole, mechanical combination/interaction of the components in the manner described above would provide for the splitting of fruit bunches.

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ISSUE OF NOVELTY/LACK OF NOVELTY ON ANTICIPATION

[16] In order to anticipate, 'the prior publication must contain clear and unmistakable directions to do what the patentee claims to have invented, (*General Tire and Rubber Company v Firestone Tyre and Rubber Company Ltd* [1972] RPC 457).

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Each and every element of the claimed invention must be present in a single prior art (*Seng Kong Shutter Industries Sdn Bhd & Anor v SKB Shutters Manufacturing Sdn Bhd* [2014] 5 MLJ 98; [2014] 4 CLJ 1037).

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[17] The defendant submits that looking at the plaintiff's patent, if any embodiment within scope of the plaintiff's claimed is obvious, then the claim is invalid. The defendant rely heavily on the case of *Seng Kong Shutter Industries*.

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[18] The plaintiff submits that the case can be distinguished from the present case on the *very* important fact that here we are dealing with prior art in the form of written publication and not prior article. All the seven pleaded prior arts are in the form of written document.

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(i) *The YCS article*

[19] The YCS article proposes the use of the muncher/shredder/monomuncher of the ffb where the ffb are torn, shredded to small masses.

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[20] All the expert witnesses (SP4, SP5, SD4 and SD5) admitted that that

- A** cutting or munching element of a typical muncher consists of cutter plates that are stacked together with separators of spaces in between. The stacked cutter plates and spacers are held together by way of square shaft.
- B** SP4 and SP5 have opined that the YCS article did not anticipate the said patent. The muncher performs a completely different function as compared to the fruit bunch splitter. As such the muncher did not disclose each and every main integer in claim 1 of the said patent.
- C** [21] SD4 said that he has work in the Ulu Remis Palm Oil Mill where the muncher uses ‘cutter plates as spikes’ there were substantially damage. SD4 agreed that even the ffb when through the muncher where the monomuncher as disclosed in the YCS article undergoes a modification, it will still be a modified monomuncher. However this machine was not pleaded by the defendant.
- D**
- E** [22] SD5 admitted that the muncher used cutter plates but he could modified the cutter plates to make it into spikes. He also admitted there is no drum in the muncher as disclosed in the YCS article. For that, there was clearly no clear and unmistakable disclosure of each and every element of the claim invention.
- F** [23] The evidence of SD4 and SD5 merely described the function of the muncher as breaking the ffb into smaller pieces while the fruit bunch splittersplit the ffb with minimal damage. It is therefore safe to conclude that in view of this obvious result, it cannot be said that YCS article renders the invention in the patent anticipated or not novel.
- G** (ii) *The US Patent*
- H** [24] The US Patent described a machine specifically used to remove the husk from a coconut. SP4 was the opinion that the coconut dehusking machine serve a completely different function while the engineering concepts of the two machines are totally different from another. SP4 pointed out the following differences between the two machines:
- I**
- (a) the two machines serve different functions;
 - (b) the US Patent does not disclose a ‘body frame’ or a ‘power source’ such as that as claimed in the patent;
 - (c) the coconut dehusking machine operates with a completely different drive mechanism — ie a motor and internal gear compared to the use of rearbox and motor for each drum roller (ie two gears and two motors for each fruit bunch splitter);

- (d) the spikes are sharpened in the US Patent but are arranged in among others a curvilinear configuration while the spikes for the fruit bunch splitters is specifically claimed to be circumferentially and longitudinally distributed on the outer surface of roller drums; and A
- (e) the two rollers of the US Patent are horizontally inclined while the roller drums of the fruit bunch splitter are to be rotatably fixed to the body frame at both ends and should be able to rotate about a horizontal axis. B

[25] SD4 admitted that the US Patent did not teach a machine which split coconut but only to dehusk coconut. He also admitted that the coconut dehusking machine grips and tears away the coconut husk with the nuts remaining intact and not split at all. SD4 also agreed that the US Patent does not teach that the rollers are fixed at about a horizontal axis but instead the rollers are inclined to allow the coconuts to roll down. SD4 also agreed that the phrase 'thrown into the machine' (as used by SD5 in his report) is incorrect as the coconut are not thrown into the machine by fed into the machine. C

[26] Under cross-examination SD5 admitted that he did not even read the whole specification of the US Patent and there is no body frame found in this US Patent. There are only rollers and that the spikes are distributed in a 'curvilinear manner'. SP5 also agreed that not every element in the patent is disclosed in a single document although the US Patent and the plaintiff's patent break up or split up different foods, SD5 was of the view that the invention in the patent to use spikes in a fruit bunch splitter is not novel inventive. D

(iii) The Kim Loong drawing

[27] According to SD4 the ffb crusher or bunch crusher is completely different from the fruit bunch splitter because the bunch crusher is a lot more light weight and is generally used for empty fruit bunches. E

Thus, the drawing does not show or explain how the machine as to be constructed oreven how it supposed to work. There is also no indication anywhere to show that little triangle attached to the rectangular boxes are meant to be spikes. F

[28] SP5 in his evidence said that crusher crushes, squeezes and deforms the ffb and this would cause significant damage to the fruitlets. In contrast, the plaintiff's machine would merely split the ffb without causing major damage to the fruitlets. G

[29] SD4 acknowledged that the ffb crusher shown in the drawing as has H

[29] SD4 acknowledged that the ffb crusher shown in the drawing as has I

A disclosed most of the essential features of the invention claim in the said patent. Therefore it cannot be said that each and every integer is disclosed in the Kim Loong drawing. SD4 also admitted in an ordinary usage, a bunch crusher would carry blunt rods or triangular plates. Also the Kim Loong drawing merely show most and not all the essential features of the plaintiff's invention.

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[30] SD5 acknowledged that the Kim Loong drawing does not show how the machine would work and there is no explanation attached to the drawing. He admitted that the triangular shaped protrusions in the drawing could be triangular plate and not conical spikes. He also admitted that when looking at
C the Kim Long drawing, he would not come to the machine exactly like the plaintiff's machine.

(iv) *IPC Article, National Seminar Article, MPOB Article and JOPR Article ('the four articles')*

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[31] The plaintiff submitted that the four articles proposed a continuous sterilisation process involving the use of double roll bunch crusher. This continuous sterilisation process is different from conventional system or the batch process system.

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[32] Both SP4 and SP5 have explained the difference in the two sterilisation system. SP4 said that none of the four articles mention the body frame, drum assembly and power source. In fact it appears that the rollers are in fact 'cross section star shaped rollers with iron rod welded to the outer edge of each sharp
F edge of the star'. The elements that are welded to the star shaped rollers are blunt rods and the triangle shaped plate are not spikes. The elements also are not welded on circumferentially.

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[33] SP5 also explained that the crushing causes the ffb to be squeezed or deformed as they pass through the crusher and thereby causing significant bruising to the fruitlets. In contrast the plaintiff's machines were to split the ffb with minimal damage to the fruitlets.

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[34] SD4 in his evidence admitted that the bunch crusher or double roll crusher is normally used in a continuous sterilisation system. That allows the crushed ffb to be processed continuously. As such it is not detrimental even if the ffb are bruised.

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[35] SD5 agreed that the continuous sterilisation process is different from the batch sterilisation process. According to the four articles when the ffb go through crusher, it will cause damage 30% to the fruitlets.

[36] On the evidence of SP4 and SP5, the plaintiff submits that none of the

prior arts contain each and every integer of the plaintiff invention in a single document and with if that the defendants is contention to the validity of the plaintiff's patent based on the ground of lack of novelty will also fail.

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[37] I have read and reviewed in detail the testimonies of all the witnesses, documentary, exhibits, physical exhibits and the submission of both the parties, after much thought and deliberation I have come to the conclusion that the invention embodied in the plaintiff's patent is inventive and not obvious to persons' skilled in the art at the material time.

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[38] In *The Asia File Products Sdn Bhd v Brilliant Achievent Sdn Bhd & 2 Ors* MTKL GS No 05 (IP)-22-47 of 2010 (unreported) the court held that:

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The function of a claim of a patent is to define the monopoly claimed clearly and with precision, so that others may know the exact boundaries of the area within which they will be trespassers. The claims enumerate a combination of features which defines the monopoly. The scope of the patentee's monopoly is defined by the claim or claims, not by the description of the invention in the body of the patent specification. Hence, an understanding of the meaning of the claims is critical. The claim must be read through the eyes of the notional addressee. In construing a claim, it must be read and interpreted as it would be read and interpreted by the notional skilled addressee of the patent specification, that is to say, a man skilled in the relevant art who has at his disposal the common knowledge in that art the relevant date (see *B Braun Melsungen AG v Terumo Kabushiki Kaisha*). The person skilled in the art is a hypothetical person, a legal creation as described in *Pfizer's Patent* [2001] FSR 201 at p 226. The court interprets the patent objectively, but the mantle of the notional person skilled in the whom it is directed and in the light of the common general knowledge which he is assumed to be aware. It is worth emphasizing that the question of obviousness is a question solely for this court to determine, hence the requirement for the court to don the mantle of the 'notional skilled addressee'.

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[39] In this regard SP4 is a person who is skilled in the relevant arts by virtue and nature of this job functions and experience that he has the technical background and have the practical interest in the subject matters. SP4 has assisted the court in interpreting the patent and is understanding the relevant common general knowledge about the prior art at the priority date.

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[40] It is important to highlight here that person skilled in the art was defined in *Catnic Components Ltd and Another v Hill and Smith Ltd* [1982] RPC 183 as being someone 'with practical knowledge and experience of the kind of work in which the invention was intended to be used.'

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[41] The court finds the defendant expert opinion lumped each and every machine including the plaintiff's machine as:

- A 'A machine to open up the fruitlets for purpose of facilitating steam penetration'. Of course this is too general to approach the issue of inventive step. Case *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724.
- B [42] The court also found the report prepared by both SD4 and SD5 bear uncanny similarities in term of phraseology and even wording found in the conclusion as such their report and opinion are highly questionable as if it was prepared by someone else.
- C [43] As to SD6 the patent attorney called by the defendant, it boldly substituted the clear wording of the claims ie body frame (13) with machine base (10). This interpretation is totally minconceived. SD6, being a patent agent with no practical experience or interest in palm oil machinery cannot be regarded as a person skilled in the art.
- D [44] Having heard and determined the evidence of SP2, SP4 and SP5 the interpretation of body frame to meant the component No 13 is more feasible as the intention of the patentee as compared to what been said by SD6. SD6 himself has considered that if his interpretation in claim 1 is wrong than his conclusion on infringement would closely match those of the Mc Laughlin ie the infringement would be established.
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- F [45] In *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525 the element required for establishing copyright infringement are set out as follows:
- G (a) sufficient objective similarity;
- (b) causal connection; and
- (c) what has been infringed must constitute a substantial part of the original work.
- H [46] The plaintiff submits that they need only to show substantial similarity between the copyrighted works and the alleged infringement work that is:
- I (a) the roller drums with plurality of spikes attached circumferentially and longitudinally around the drums; and
- (b) the power source which shows the pair of motors, pair of gearboxes and belt of chain pulley assemblies.
- [47] The burden thus shifts to the defendants to rebut the causal connection. The defendants have merely alleged as follows:
- (a) that they have never had access to the copyrighted works;

- (b) that the plaintiff's demonstration unit was not installed at the said premises and was immediately transported back after the demonstration; A
- (c) the SK Machines were adapted from the Kim Loong machine which was completed in or around 2003 (presumably, based on the Kim Loong drawing); and B
- (d) the SK Machines were not copied, replicated, made or fabricated from any design drawing of the plaintiff's fruit bunch splitter.

[48] The aforesaid defence is at best bare denials which are unsustainable in light of the evidence adduced by the plaintiff or an actual causal connection between the SK Machines with the plaintiff's design drawings and the fruit bunch splitter through the following: C

- (a) the demonstration of the plaintiff's fruit bunch splitter which took place at the first defendant's mill on 24 April 2009 and 25 April 2009; D
- (b) the plaintiff sent a quotation to the first defendant for the plaintiff's fruit bunch splitter Model model KH-7 which provided the breakdown costs for the supply and installation of the machine together with other machineries at the said premises. The specific dimensions and specifications of these machineries were also included. Further, the plaintiff had also attached a detailed machinery layout technical drawing dated 22 April 2009 together with the said quotation; E
- (c) however, instead of purchasing from the plaintiff, the first defendant purchased the SK Machines the second defendant instead, on or about 5 September 2009 and 29 January 2010 which is not long after the demonstration which took place at the first defendant's mill on 24 April 2009 and 25 April 2009; F
- (d) the SK Machines — reinforcement bars which are also in the plaintiff's fruit bunch splitter PW1 has explained that the reinforcement bar were only introduced by the plaintiff in 2008, which is after the Kim Loong drawing was created; and G
- (e) the bearing housing in the SK Machines are embedded within the body frame as is the case with the plaintiff's fruit bunch splitter. This is contrast to the Kim Loong drawing whereby the bearing housing is located outside the casing. H

[49] Based on the evidence given by the plaintiff the court is of the view that the defendant had infringed the plaintiff copyright, that is: I

- (a) there is copyright subsisting in the Copyrighted Works and three-dimensional embodiment of the machine belonging to the plaintiff

- A (which prima facie evidence through the statutory declaration affirm by PW1 has not been rebutted by the defendants);
- (b) there is sufficient objective similarity between the defendants' SK Machines and the Copyrighted Works (as set out in Annexure G);
- B (c) there is a causal connection between the plaintiff's fruit bunch splitter and the SK Machines through the inference of copying (based on the substantial similarities); and
- (d) the similarities between the plaintiff's fruit bunch splitter as shown through the Copyrighted Works and the SK Machine constitute a substantial part of the original work.
- C

CONCLUSION

- D [50] On the balance of probabilities the plaintiff, has layout a case for:
- (a) infringement of the said patent; and
- (b) infringement of copyright subsisting in the copyrighted works being the various design drawn for the plaintiff's fruit bunch splitter and its component parts.
- E

[51] The defendants have failed to make their case to the counter claimed for the invalidation of Malaysian Patern No My-139512-A or declaration that no copyright subsits in the Copyrighted Works.

- F [52] Therefore the plaintiff's claimed is allowed while the defendants counterclaim is dismissed with cost.

Plaintiff's claim allowed; defendants' counterclaim dismissed with costs.

- G Reported by Dzulqarnain Ab Fatar

H

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